RECENT CASES.

BAILMENT—LIABILITY OF INN-KEEPER—TRUNK SENT IN ADVANCE OF GUEST—The plaintiff forwarded his trunk to a hotel twelve days before he was to come himself. The trunk was placed in a store-room and there opened and looted before his arrival. *Held:* The relation of inn-keeper and guest did not arise until the actual arrival of the owner of the trunk at the hotel. Until then the proprietor of the hotel was merely a gratuitous bailee and was not liable except for gross carelessness. Hirsch v. Anderson Hotel Co., 58 Pa. Super. Ct. 387 (1914).

The rule seems clear that one who does not procure accommodations is not a guest and the liability for the goods of one not a guest is that of a gratuitous bailee. So, where one turned his luggage over to hotel porter intending later to secure accommodations at the hotel, but afterwards changed his mind and the luggage was stolen before he called for it. Tulane Hotel Co. v. Holohan, 112 Tenn. 214 (1903); where a guest at an inn paid his bill in the morning, had his name stricken from the register, purposely to relieve himself from liability as a guest during a short absence, even though intending to return at night. Miller v. Peeples, 60 Miss. 819 (1883); Strauss v. County Hotel and Wine Co., 49 L. T. Rep. (N. S.) 601 (Eng. 1883).

The responsibility of the inn-keeper to his guest is similar to that of a common carrier to its passenger. So where plaintiff checked his baggage to a certain point but himself stopped over night at an intermediate station it was held that the relation of passenger and carrier had ceased and defendant was merely a warehouseman and not liable for the loss of the baggage except in the event of gross negligence. Merritt v. Lehigh Valley R. R. Co., 49 Pa. Super. Ct. 219 (1912). It is not necessary that the arrival of the guest and his luggage at the hotel be absolutely contemporaneous; where baggage is delivered to the inn-keeper as the baggage of an intended guest who, within a reasonable time thereafter actually becomes a guest, the responsibility of the inn-keeper for the safe-keeping of the baggage relates back to the time when baggage was delivered. Eden v. Drey, 75 Ill. App. 102 (1897). So where an express company delivered a trunk, which disappeared before the owners' arrival, forty-five minutes later, the hotel-keeper was liable. Flint v. Illinois Hotel Co., 149 Ill. App. 404 (1909).

BILLS AND NOTES—INTOXICATION OF MAKER—AFFIRMANCE—The defendant, while intoxicated, executed a promissory note for a valid, pre-existing debt. He recognized the note as a binding obligation for five years after its execution and, during that time, made numerous promises to pay it. In an action upon the note, the defendant contended that the note was invalid because signed while he was intoxicated. *Held:* The ratification of the note precluded him from asserting this defence. Matz v. Martinson, 149 N. W. Rep. 370 (Minn. 1914).

The weight of authority is that a party may plead his intoxication in avoidance of a contract. There is some difference of opinion as to what degree the intoxication must reach in order to render the contract voidable but it is generally not sufficient that the party was under mere "undue excitement" from liquor but he must be so far deprived of his reason and understanding as to render him incapable of understanding the character and consequence of his act. J. I. Case Threshing Machine Co. v. Meyers, 111 N. W. Rep. 602 (Neb. 1907); Dewitt v. Bowers, 183 S. W. Rep. 1147 (Tex. 1911). The modern view is that a contract, although voidable, by reason of the intoxication of one of the parties, is not void, and, consequently, may be ratified when the party becomes sober, and, if so ratified, will be enforced. Matthews v. Baxter, L. R. 8 Exch. 132 (1873); Johnson v. Harmon, 94 U. S. 371 (1876); Snead v. Scott, 62 So. Rep. 36 (Ala. 1913). This is true though the intoxication was voluntary and not procured by the circumvention of the other party. Fowler v. Meadow Brook Water Co., 208 Pa. 473 (1904).

Where a person seeks to repudiate a contract upon the ground that when he made it he was intoxicated, he must show not only that he was incapacitated by intoxication, but also that he rescinded the agreement within a reasonable time after his recovery, and placed the other party *in statu quo*, by returning the consideration received. Fowler v. Meadow Brook Water Co., *supra;* Joest v. Williams, 42 Ind. 565 (1873). Thus, if a party executes a promissory note while he is intoxicated, but after becoming sober ratifies the transaction by keeping the consideration which he received for the note, he cannot afterward avoid the note. Smith v. Williamson, 8 Utah, 219 (1892). The defence of drunkenness of the maker of a negotiable note is not available against the same in the hands of a *bona fide* holder for value. McSparran v. Neeley, 91 Pa. 17 (1879); Smith v. Williamson, *supra.* See also "Intoxication as a Defence to an Express Contract," 62 U. OF P. L. R. 34.

CARRIERS—LIMITED LIABILITY—BAGGAGE—Carriers of passengers by reasonable regulations brought to the knowledge of the passenger, may be protected against liability as insurers for baggage to a specified value, except when paid additional compensation proportional to the risk, and $100 is a reasonable amount in value above which an additional charge may be made. Zetler v. Tonopah & Goldfield R. Co., 143 Pac. Rep. 119 (Nev. 1914).

As a general rule in the carriage of the passenger's baggage the carrier incurs the full responsibility of the common carrier of goods, and becomes insurer of its safety against every accident which is not the act of God or of the public enemy or the fault of the shipper himself. Railroad Co. v. Knight, 58 N. J. L. 287 (1895); Saunders v. Ry., 128 Fed. 15 (1904). A common carrier may by contract with the passenger limit his liability in regard to baggage the same as he may to freight. Steers v. Steamship Co., 57 N. Y. 1 (1874), and the same rules apply. The fundamental rule is that he cannot contract for exemption from liability for losses caused by his own negligence or the negligence of his servants. Severpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397 (1889); Armstrong v. Express Co., 159 Pa. 640 (1894); Cox v. Rd., 170 Mass. 129 (1898). Some jurisdictions allow total exemption, Wabash Rd. Co. v. Brown, 152 Ill. 484 (1894). Nevertheless, even where negligence cannot be exempted the carrier can contract so as not to be liable over a specified amount for losses even though they are caused by his negligence. Hart v. P. R. R., 112 U. S. 331 (1884); Boston & Maine Rd. v. Hooker, 233 U. S. 97 (1914); Hood Co. v. American, *etc.*, Co., 77 N. E. Rep. 638 (Mass. 1906); Hughes v. P. R. R., 202 Pa. 222, *contra* (1902); and thus the carrier practically escapes ninety-nine *per cent.* of his negligence, but not it all. The theory of the rule is that the passenger has opportunity to declare the value of his baggage and if it exceeds the amount that will be carried free, he must pay an additional charge, for the carrier's free rate was given merely for a small risk and the greater risk can be obtained by paying more for it. So if the passenger accepts the free rate he cannot enforce any but the low liability no matter what the real value of the goods which were lost might be. Hart v. Railroad, *supra.* In order to make this contract binding on the passenger he must have had the free opportunity of choosing to send his baggage under the common law liability and being charged in addition, or to accept the carrier's offer to carry it free on his ticket providing the liability in case of loss or damage shall not exceed a certain amount, which amount is called the agreed value of the baggage. Graves v. Express Co., 176 Mass. 280 (1900); U. S. Express Co. v. Joyce, 72 N. E. Rep. 865 (1904). These rules have been carried to such an extent that if a passenger checks his baggage to his destination on his ticket with nothing more, and in the carrier's tariff it is provided that it shall not be liable for more than $100 for baggage so checked, even though the passenger knew nothing of such rules or tariff, he can only recover $100 for the loss of his baggage no matter what might have been its real value. Boston & Maine Rd. v. Hooker, 233 U. S. 97 (1914). So it is clear that the leading case is well within the prevailing rules.

CONTRACTS—ILLEGALITY—RELIEF—One who had been induced by fraudulent representations to purchase stock in a corporation, and had been promised by the manager and holder of the majority of the stock, as additional consideration, that he would be elected secretary and attorney of the company, brought suit to compel the reconveyance of title to land which he had conveyed in payment of the stock. *Held:* Though the contract was illegal as looking to the control of the company, and though the parties were equally guilty, yet in view of public policy requiring fraudulent promoting schemes to be thwarted, equity will grant relief to a party induced to contract by fraud. Gilchrist v. Hatch, 106 N. E. Rep. 694 (Ind. 1914).

The opinion in this case contains an excellent summary of the law relating to the point in issue. As a general rule, the law will leave all equally guilty of an illegal or immoral transaction where it finds them, and will not lend its aid either to enforce the contract while executory or to rescind it and recover the consideration parted with when executed. Cottonwood v. Austin, 158 Ala. 117 (1908); Klein v. Bank, 130 N. Y. Supp. 436 (1911). There are, however, four exceptions to this rule. One is where recovery is provided for by statute; *e. g.*, the many statutes allowing one who has paid his losses under a wager to recover the same. Another exception is where some fraud, duress, oppression, or undue influence is practiced by one party upon the other so that the guilt of the latter is subordinate to that of the former. In this case the parties are not considered *in pari delicto*. McDonald v. Smith, 139 Mich. 211 (1905); Stewart v. Wright, 147 Fed. Rep. 321 (1906). Thirdly, one may be granted relief, though *in pari delicto*, when the public interest will be better promoted by granting than by denying relief; and in such cases the rule must yield to public policy. Auxer v. Llewellyn, 142 Ill. App. 265 (1908). This was the main ground for the decision in the principal case, though the element of the preceding exception, *viz.*, fraud by one party upon the other, also entered into it. Lastly, if the illegal purpose of the contract has not yet been accomplished, the law allows a party to repudiate the illegal contract and recover what he has parted with thereunder. This is the doctrine of *locus poenitentiae*. Ware v. Spinney, 76 Kans. 289 (1907); Leadbetter v. Hawley, 59 Ore. 422 (1911).

CONTRACTS—MUTUALITY OF OBLIGATION—In consideration of the transfer for value of certain patent rights relating to cameras from the plaintiff to the defendant, the defendant promised to sell cameras manufactured under those letters patent to the plaintiff at a certain price. Subsequently the defendant refused to furnish cameras. *Held:* The contract is not invalid for want of mutuality because the plaintiff did not obligate himself to purchase. Conley Camera Co. v. Multiscope Film Co., 216 Fed. Rep. 892 (1914).

The general rule in the case of executory contracts is that in the absence of mutuality of obligation, they are unenforceable. Lester v. Jewett, 12 Barb. 502 (N. Y. 1849). In the case of option contracts, however, a different view prevails and if the option is granted for good consideration it is enforceable. Hoogendorn v. Daniel, 178 Fed. Rep. 765 (1910). The reason given in Joy v. St. Louis, 138 U. S. 1 (1890), and approved in the principal case is that "when a party has received payment for a privilege, he cannot resist the enforcement of that privilege on the mere ground that he cannot compel the other party to continue its enjoyment." In cases where the consideration for the option is not so apparent, the modern trend of authority in three classes of cases is interesting. (1) Contracts to supply such material as one may need in his business for a specified time are, by weight of authority, held mutual and binding, where the nature of the purchaser's business makes the quantity necessary subject to a reasonably accurate estimate. Stuart v. Home. Tel. Co., 161 Mich. 123 (1910); and acceptance of the offer binds the purchaser to conduct his business in the future so as to need substantially the same amount of materials as in the past. Wells v. Alexandre, 130 N. Y. 642 (1891). Several jurisdictions, however, hold such contracts invalid even where the quantity needed can be estimated with approximate accuracy. Hoff-

man v. Maffioli, 104 Wis. 630 (1899). In Cold Blast Co. v. Kansas City Bolt Co., 114 Fed. Rep. 77 (1902), the test laid down was whether or not the quantity depended upon the will, wish, or want of one of the parties or was ascertainable with reasonable accuracy. Parks v. Boyd Co., 91 Atl. Rep. 581 (Md. 1914). (2) In cases of contracts between automobile makers and their dealers where the dealer is bound to sell a certain number of automobiles and the maker is given an option whether or not to deliver any at all, the decisions are not in accord. It has been held void for want of mutuality, Goodyear v. Koehler Sporting Goods Co., 143 N. Y. Supp. 1046 (1913); but Gile v. Interstate Motor Car Co., 145 N. W. Rep. 732 (N. D. 1914), took the opposite view and held a substantially similar contract enforceable. The latter decision may possibly be reconciled on another ground, that an independent consideration was present. See 62 U. of P. L. R. 633. (3) In the third class of cases dealing with the much discussed option clause in baseball contracts, wherein the retention of the player's services for the succeeding year is optional with the club owners, while they at the same time have the power to terminate the contract on ten days' notice to the player, has been held lacking in mutuality and unenforceable in equity in so far as it bound the player to renew. Am. League Club of Chicago v. Chase, 149 N. Y. Supp. 6 (1914); Brooklyn Baseball Club v. McGuire, 116 Fed. Rep. 782 (1902); Weegham v. Killefer, 215 Fed. Rep. 168 (1914); but the contrary was held in Phila. v. Lajoie, 202 Pa. 210 (1902).

CONTRACTS—STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—MECHANIC'S LIEN—A person holding a recorded mortgage on a building in course of construction, and who still retained in his possession a large portion of the mortgage money, agreed orally to pay the claim of a subcontractor, if he would not file a mechanic's lien, which the latter had a right to file. *Held:* The promise is not within the provisions of the Statutes of Frauds and Perjuries of 1855, P. L. 308. Silberstein v. Bernstein, 58 Pa. Super. Ct. 375 (1914).

As the court pointed out in this case there were two reasons why the statute did not apply to the facts: (1) The rule in Pennsylvania following that laid down in Emerson v. Slater, 63 U. S. 28 (1859) is that: "Whenever the main object of the promisor is not to answer for the debt of another, but to subserve some business or pecuniary purpose of his own, involving either benefit to himself or damage to the other party, his promise is not within the statute, although it may be in form a promise to answer for the debt of another, and although the performance may incidentally have the effect of extinguishing that debt." Webber & Co. v. Bishop, 12 Pa. Super. Ct. 51 (1899); Klein v. Rand, 35 Pa. Super. Ct. 263 (1908); Bailey v. Marshall, 174 Pa. 602 (1896). (2) A promise to pay the debt of another is not within the Statute of Frauds, even though the liability of the original debtor continues if the promisor has received a fund pledged, set apart or held for the payment of the debt. Maule v. Bucknell, 50 Pa. 39, 52 (1865); Burns v. Mazar, 2 Pa. Super. Ct. 436 (1896). On this point there is considerable difference of judicial opinion, some jurisdictions holding that only where the original debtor is released at the time of the new promise the statute does not apply. O'Connell v. Mt. Holyoke College, 174 Mass. 511 (1899); Miles v. Driscoll, 201 Mass. 318 (1909); Engleby v. Harvey, 93 Va. 440 (1896). However, where the principal object is to secure benefit to the promisor the general rule is that the statute does not apply although the original debtor is not released. It has been held that where the promisor agrees to relinquish a lien on property in which the promisee has an interest that the promise does not have to be in writing, Small v. Schaeffer, 24 Md. 143 (1895); Weisel v. Spruce, 59 Wis. 301 (1884); Luark v. Malone, 34 Ind. 344 (1870), and on principle there seems to be no distinction between these cases and the principal case. In the case of Boeff v. Rosenthal, 78 N. Y. Supp. 1108 (1902), where the facts were practically identical, the court reached the same conclusion.

CRIMINAL LAW—MISCONDUCT OF JURY—Under a prosecution for selling beer contrary to the statute, three bottles of the intoxicant were introduced in evidence and sent to the jury room as exhibits. When the jury returned to the court room, the three bottles were found in the jury room empty. *Held:* In sampling the contents of the bottles the jury clearly violated the law as they had no right to resort to any such experiments in ascertaining defendant's guilt or innocence. State v. Applegate, 149 N. W. Rep. 356 (N. D. 1914).

Jurors in deciding the issues before them must content themselves with the evidence adduced in the court room and may not indulge in experimentation on their own account; where defendant was accused of homicide, and his clothing offered in evidence showing no powder marks, two jurors experimented with a rifle outside of the court room in order to ascertain at what distance powder marks would be left upon clothing and a new trial was granted. People v. Conkling, 111 Cal. 627 (1896); so where the jury "sampled" some ice on defendant's ice wagon to ascertain whether it was good ice or not, Consolidated Ice Machine Co. v. Trenton Hygeian Ice Co., 57 Fed. Rep. 898 (1893); so in a prosecution under the local option laws, jurors tested exhibits to ascertain whether intoxicating or not, Galloway v. State, 42 Tex. Cr. R. 380 (1900); State v. Baker, 67 Wash. 595 (1912). But it was not error to permit the jury to take a bottle of alcohol alleged to have been sold to prosecutrix and smell its contents. Thomson v. State, 160 S. W. Rep. 685 (Tex. 1913).

The parties being entitled to calm, dispassionate deliberations on the part of the jury, a new trial will be granted if the jury consume any spirituous liquors during the discussions, State v. Bullard, 16 N. H. 139 (1844); Bank v. Fowler, 7 Cow. 502 (N. Y. 1827); People v. Douglass, 4 Cow. 36 (N. Y. 1825). Circulation of spirituous liquors with consent of both parties is ground for reversal, Rose v. Smith, 4 Cow. (N. Y.) 17 (1825); similarly drinking of intoxicants is absolute ground for new trial, Jones v. State, 13 Tex. 168 (1854); Davis v. State, 35 Ind. 496 (1871); Leighton v. Sargent, 31 N. H. 114 (1855); Ryan v. Harrow, 27 Ia. 494 (1860); State v. Bruce, 48 Ia. 530 (1878). In some jurisdictions the drinking of stimulating liquors merely raises a presumption of prejudice to the defendant which prosecution must rebut affirmatively, Gamble v. State, 44 Fla. 429 (1902); Jones v. People, 6 Colo. 452 (1895); Jones v. State, 68 Ga. 760 (1882); Dolan v. State, 40 Ark. 454 (1883); State v. Madigan, 57 Minn. 426 (1894); State v. Greer, 22 W. Va. 800 (1893).

CRIMINAL LAW—PRESUMPTION OF INNOCENCE—INSANITY—Sanity being the normal condition of the mind, its existence is to be presumed. The burden of proof is on him who pleads insanity. Hence there can be no presumption of innocence when killing without justification is proved and defense is insanity. Com. v. Wheeler, 246 Pa. 528 (1914).

The general rule in the great majority of jurisdictions is that where insanity is interposed as a defense to murder, it must be established by affirmative proof as every person is presumed to be sane until the contrary is proved. State v. De Rance, 34 La. Ann. 186 (1882); Kwell v. State, 139 Ala. 1 (1909). A few jurisdictions, however, hold that as "sound memory and discretion," is as much an ingredient of murder as any other, it devolves upon the state to show sanity beyond a reasonable doubt. State v. Crawford, 11 Kan. 32 (1873).

In those jurisdictions upholding the presumption of sanity, it is not enough, in order to overthrow such a presumption, to raise a doubt as to prisoner's sanity in the jury's mind. Lynch v. Com. 77 Pa. 213 (1894). The evidence of insanity must be "fairly" preponderating. Com. v. Molten, 230 Pa. 399 (1911); but an instruction that the evidence must be "clearly" preponderating is erroneous. Coyle v. Com., 100 Pa. 573 (1882). But where the doubt was created solely by the state's evidence, the defendant is entitled

to an acquittal, McDougal v. State, 88 Ind. 24 (1887). The state is not called upon to offer evidence of sanity in the first instance, but may do so in reply to the defendant's evidence of insanity, Com. v. Eddy, 73 Mass. (7 Gray) 583 (1856). Where defendant is a fugitive from a lunatic asylum the burden rests on the state to show that he was restored to reason before doing the killing, State v. Browshead, 3 Wkly. Law Bul. 187 (Ohio, 1878), but the fact that defendant was subject to spells of insanity from time to time does not raise a presumption of insanity so as to shift the burden of proof to the state, Talbert v. State, 140 Ala. 96 (1904); nor does a state of chronic insanity cast upon the prosecution the burden of showing a lucid interval at time of killing. State v. Palmer, 161 Mo. 152 (1901).

EVIDENCE—OTHER OFFENSES—BRIBERY—In the prosecution of a public officer for the solicitation of a bribe, evidence of another similar solicitation was held admissible, but only to prove the specific intent charged in the indictment. State v. Davis, 106 N. E. Rep. 770 (Ohio, 1914).

It is well established that evidence of other offenses is inadmissible if offered to prove that the accused is more likely to have committed the crime for which he is on trial. Regina v. Oddy, 5 Cox C. C. 210 (Eng. 1851); People v. Pettanza, 207 N. Y. 560 (1913). As an exception to this general rule, it is equally well settled that evidence of collateral offenses is admissible, on the trial of the main charge, to prove motive or intent. Clark v. People, 224 Ill. 554 (1906); People v. Weinseiner, 102 N. Y. Supp. 579 (1907). The admissibility of other offenses in this class of cases is based upon the doctrine of chances and probabilities. The evidence is merely presumptive proof of the intent. Rex v. Francis, 2 C. C. R. 128 (Eng. 1874). Where a specific intent is required for conviction, the competency of the evidence of other offenses is limited to the proof of the specific intent charged in the indictment. Com. v. Eastman, 1 Cush. 216 (Mass. 1848); Com. v. Sheppard, 1 Allen, 575 (Mass. 1861).

In accord with the decision of the principal case, it is generally held that on the trial for the giving or the solicitation of a bribe, the intent of the accused may be shown by similar acts committed at other times. Higgins v. State, 157 Ind. 57 (1901); Carden v. State, 62 Tex. Cr. App. 545 (1911). There have, however, been numerous deflections from this generally accepted rule. People v. Hurley, 126 Cal. 351 (1899); State v. Fitchette, 92 N. W. Rep. 527 (Minn. 1902). These decisions have been severely criticized as breeding defiance of the law and encouraging criminals in gambling on the result of judicial quibbles. Wigmore's Evidence (ed. 1904), vol. I, §343.

EVIDENCE—PHYSICAL EXAMINATIONS OF PERSON INJURED—A federal court has no power to compel the plaintiff in an action of tort to submit to a physical examination by disinterested physicians. Brace v. Central R. R. of N. J., 216 Fed. Rep. 718 (1914).

At the early common law no instance has been disclosed of any case where, in a civil action for personal injuries, a physical examination of the plaintiff has been compelled. The principal case, in refusing to order an examination, followed the rule laid down in Union Pacific Ry. Co. v. Botsford, 141 U. S. 250 (1890), where the decision was based upon the sacred right of every individual to control his own person fee from interference and restraint. In that case there was a strong dissenting opinion. In Camden Ry. v. Stetson, 177 U. S. 172 (1899), such examination was ordered under a local statute.

Among the state courts the great weight of authority favors the power. The right in Pennsylvania is justified as being within the equitable powers inherent in courts to regulate practice in the furtherance of justice. Hess v. Ry. Co., 7 Pa. Co. Ct. 565 (1882); Dimenstein v. Riechelson, 34 W. N. C. 295 (Pa. 1893); Wanek v. City of Winona, 80 N. W. Rep. 851 (Minn. 1899). In Lane v. Northern Ry. Co., 21 Wash. 119 (1899), it was said that "courts should not sacrifice justice to notions of delicacy." The power is denied in a

few states. Richardson v. Nelson, 77 N. E. Rep. 583 (Ill. 1906). In several states the power is given by statute. McGovern v. Hope, 42 Atl. Rep. 830 (N. J. 1899); Goldenberg v. Zirinsky, 100 N. Y. Supp. 251 (1906). According to the better view the right to compel examination is not absolute but depends upon the circumstances and is at the discretion of the court. Fullerton v. Fordyce, 121 Mo. 1 (1894). See also 62 U. OF P. L. R. 207.

EVIDENCE—PRESUMPTION—UNDUE INFLUENCE—A woman shortly before her death made a new will in which she bequeathed a large part of her property to a certain church and its rector. She had never met the rector until a few weeks before her death and had not even known that there was such a church as the church in question. There was no evidence of change of feeling towards the contestant who was the legatee under the first will. It appeared that the rector had been a frequent caller during the last illness, leaving the testatrix under the impression that she was morally bound to "do something" for the church and that he had had something to do with employing the lawyer who drew the will. *Held:* The case should have gone to the jury with the instructions, that there was evidence of a fiduciary relation existing between testatrix and the rector, sufficient to raise a presumption of undue influence on his part, which presumption he was bound to overcome. *In re* Hartlerode's Estate, 148 N. W. Rep. 774 (Mich. 1914).

There are certain cases in which the law indulges in the presumption that undue influence has been exercised which it is incumbent on the proponent of the will to disprove; as where a patient makes a will in favor of his physician, Conklin v. Conklin, 165 Mich. 571 (1911), but see *In re* Cornell's Estate, 43 App. Div. 241 (N. Y. 1899); a client in favor of his attorney, Gibson v. Jeyes, 6 Ves. 278 (Eng. 1801); *In re* McMaster's Estate, 163 Mich. 210 (1910), but *cf. In Re* Hooker's Estate, 207 Pa. 203 (1903); or a sick person in favor of his priest or spiritual adviser, whether for his own personal advantage, McPherson v. Byrne, 155 Mich. 338 (1908); Ross v. Conway, 92 Cal. 632 (1892), or for the advantage of some interest of which he is the representative, Ross v. Conway, *supra,* or where the will is drawn in favor of one's confidential adviser and business associate. Richmond's Appeal, 59 Conn. 226 (1890). This presumption is, however, rebuttable. *In re* Sparks Will, 63 N. J. Eq. 242 (1902); Donovan v. Bromley, 113 Mich. 53 (1897). These cases are the cases of "fiduciary relationship" so-called, into which, because of the existence of confidential relations between testators and legatees, the court will examine more closely than into other cases on account of the ease with which such relationships can be abused to the detriment of rightful heirs. The principal case is of this class of case.

EVIDENCE—RES GESTAE—The exclamation of a boy four years of age that "the bums killed Pa with a broomstick", which was made within thirty seconds after a fatal assault in the boy's presence upon his father, is admissible in evidence as part of the *res gestae.* State v. Lasecki, 106 N. E. Rep. 660 (Ohio, 1914).

There are as many definitions of *res gestae* as there are works on evidence, and possibly no part of the law of evidence is in greater confusion. Elliott, in his Treatise on Evidence, vol. I, §536 (ed. 1904), defines *res gestae* as "declarations or acts which accompany and are a part of the transaction in controversy, and tend to explain it, such transaction itself being admissible in evidence." But in this country at least, the courts seem inclined to use the term as a broad and convenient cloak for admitting any evidence which they wish to admit, but which cannot be brought in under any other rule. However, whether strictly part of the *res gestae* or not, it is well settled that spontaneous exclamations made in consequence of a sudden outward occurrence causing excitement or shock are, in general, admissible. R. v. Foster, 6 C. & P. 325 (Eng. 1834); Ins. Co. v. Mosley, 8 Wall. 397 (U. S. 1869). The reason given for this in the principal case is that "the

language proceeds from impulse, from the natural and necessary impressions made by the acts of the parties in controversy, so that the human mind in its helplessness or despair, or its natural and necessary anxiety, acts under an impulse or a spontaneous influence that is a sort of echo or reaction from the general situation." In England the words must be precisely contemporaneous with the act. R. v. Bedingfield, 14 Cox C. C. 341 (Eng. 1879). In America the rule is more liberal, as is illustrated by the principal case. The utterance need not be strictly synchronous, but must merely be made before there has been an opportunity to deliberate or to fabricate some statement according to one's self-interest. Com. v. Van Horn, 188 Pa. 143 (1898). In Britton v. Power Co., 59 Wash. 440 (1910), where a boy remained unconscious for eight days after a fall from a street car, his statement, made at once upon becoming conscious, that the conductor of the car kicked him off the steps, was held admissible as part of the *res gestae*. According to the weight of authority, the declarant need not be a participant in the transaction, but may be a mere bystander, provided of course his statements relate only to what has come under his own observation. Cooper v. State, 138 S. W. Rep. 826 (Tenn. 1911); Easley v. State, 159 S. W. Rep. 36 (Ark. 1913). Nor need the declarant be one who would be personally competent as a witness. In Grant v. State, 124 Ga. 757 (1906), as in the principal case, the declarant was a child too young to testify. On the other hand, to make the declaration admissible, it is not necessary to show the death, absence, or other unavailability of the declarant. This has never been disputed. Wigmore on Evidence (ed. 1904), vol. 3, §1748.

EVIDENCE—STATEMENT IN PRESENCE OF ACCUSED—A statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it in effect his own. A mere denial by the accused of the facts mentioned in the statement does not necessarily render the statement inadmissible, although in such case its evidential value would be very small and, in practice, the court would properly exercise its influence to prevent such evidence being given. Director v. Christie, 111 Law Times, 221 (Eng. 1914).

In the principal case, counsel for the accused argued that if the accused denied the statement made in his presence, it should be inadmissible as a matter of law for its affect upon the jury would be prejudicial to the prisoner however carefully the judge might instruct the jury. Rex v. Norton, 2 K. B. 496 (1910), was cited to sustain this proposition but it does not seem to go quite that far as it was said in that case, "It is, perhaps, too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner." It may be stated as a general rule that statements made to or in the presence of a person, accusing him of the commission or complicity in a crime, are, when not denied, admissible in evidence against him as warranting an inference of the truth of the statements. O'Hearn v. State, 79 Neb. 515 (1907); Gannon v. Metcalf, 127 Ill. 507 (1889); People v. Byrne, 160 Cal. 217 (1911). *Contra* to the principal case, the weight of authority is that if the accused denies the statements, the whole occurrence is incomplete as evidence against him as the whole ground for using it is destroyed. State v. Swenson, 129 N. W. Rep. 119 (S. D. 1910); Brown v. State, 65 S. W. Rep. 401 (Miss. 1901); Merriweather v. Commonwealth, 118 Ky. 870 (1904). But if the accused makes a reply wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. Commonwealth v. Trefethen, 157 Mass. 180 (1892). See also 63 U. OF P. L. R. 233.

INTERSTATE COMMERCE—RECOVERY FOR OVERCHARGES—JURISDICTION—A shipper brought suit against a carrier in a district court for making overcharges in violation of the carrier's tariff schedules, filed and published under

the Interstate Commerce Acts. Motion to dismiss the suit was made on the ground that the court was without jurisdiction until the proper rates of charge, alleged to have been exceeded, had been interpreted by the Interstate Commerce Commission. *Held:* The motion must be disallowed. Under the Acts of Congress in question it is optional with the complainant whether he seek redress in the courts or before the Commission. Gimbel Bros., Inc., v. Barrett, 215 Fed. Rep. 1004 (1914).

The point here involved is clearly covered by the Interstate Commerce Act of 1887, which provides (Sec. 9) that one seeking redress under the Act "must elect" whether he will proceed in the courts or before the Commission. The Act also provides (Sec. 22) that the provisions of the Act are in addition to the remedies existing at the common law. The fixing of rates by a commission pursuant to the law creating the commission, has the same force as if done by the legislature itself. Louisville, *etc.*, R. R. v. Garrett, 231 U. S. 298 (1913). A deviation from such rates amounts to a discrimination and, by the provisions of the Act, gives the interstate shipper the option of proceeding in the courts for his common law remedy, or of seeking redress before the Commission.

In determining the reasonableness of the filed and published rates themselves, however, we do not find this choice of procedure. With certain well defined exceptions—see I. C. C. v. U. P. R. R., 222 U. S. 541 (1912)—the Interstate Commerce Commission is the only tribunal which can decide whether a published rate is reasonable or not. Texas & Pacific Ry. Co. v. Abiline Cotton Oil Co., 204 U. S. 466 (1898). Nor will the courts pass on the question of whether published rates are discriminatory, or whether there is discrimination in service, *etc.*, until such question has been passed on by the Commission. B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481 (1909); Minnesota Rate Cases, 230 U. S. 352 (1912). So also the application of published rates to commodities not specifically listed is for the Commission. Texas & Pacific Ry. Co. v. American Tie Co., 234 U. S. 138 (1913).

INTERSTATE COMMERCE—SUBJECTS OF INTERSTATE COMMERCE—STOCKS AND BONDS—A statute of Iowa, commonly termed the "Blue Sky Law", placed a restriction upon the introduction into the state and sale therein of stocks and bonds by the citizens of other states. *Held:* This law imposes a direct burden upon interstate commerce and is therefore invalid and unconstitutional. William R. Compton Co. v. Allen, 216 Fed. Rep. 537 (1914).

The general rule would seem to be that whatever is subject of barter and sale, if employed in commerce with "foreign nations, between the states, or with Indian tribes", is a part of interstate commerce and so subject to regulation by Congress, free from substantial interference by the states. Concerning the staple commodities employed in the ordinary commercial transactions no doubt arises, but matters like that illustrated in the principal case are close to the line. In the Lottery Cases, 188 U. S. 321 (1903), it was decided that lottery tickets shipped from one state to another were part of interstate commerce and subject to regulation as such. So also the textbooks, *etc.*, used for courses of study under the direction of a correspondence school are considered to be employed in interstate commerce. International Text-book Co. v. Pigg, 217 U. S. 91 (1909). So also an agency for the solicitation of passengers for interstate journeys is engaged in interstate commerce. McCall v. California, 136 U. S. 104 (1890). Clearly in line with these decisions is the decision in the principal case, which is directly supported by one other recent decision. Alabama & N. O. Trans. Co. v. Doyle, 210 Fed. Rep. 173 (1914).

But not every business connected with commerce is commerce, and subject to regulation as such. One who deals in foreign bills of exchange is not engaged in interstate commerce. Nathan v. Louisiana, 8 How. 73 (U. S. 1850). The same rule applies to commercial agencies, State v. Morgan, 159 U. S. 261 (1894); collection agencies, U. S. Fidelity and Guaranty Co. v. Kentucky, 231 U. S. 394 (1913); the business of a live stock exchange, Hop-

kins v. U. S., 171 U. S. 578 (1898); a cotton brokerage business dealing in futures and options, Ware & Leland v. Mobile County, 209 U. S. 405 (1907). Since the case of Paul v. Virginia, 8 Wall. 168 (U. S. 1868), an insurance policy has been held not to be a part of interstate commerce. N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389 (1900). Nor does the fact that the insurance policies or other commercial instruments employed in the cases just cited are transported through the mails operate to make the transaction a part of interstate commerce. N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 (1913).

PLEADING—OBJECTION TO EVIDENCE ON GROUND OF INSUFFICIENT STATEMENT—After pleading to the merits, the defendant objected to the introduction of any evidence "for the reason that the petition shows on its face that the plaintiff is not entitled to recover". *Held:* The practice of objecting to the introduction of any evidence in a cause on the ground that the complaint does not state a cause of action is very objectionable. It is only when the defect of the petition is of such a nature that it cannot be cured by the verdict of the jury, that it is not waived by pleading to the merits. United Kansas Portland Cement Co. v. Harvey, 216 Fed. 316 (1914).

If a petition states a cause of action imperfectly or indefinitely, *i. e.*, if it is merely defective in form, it is cured by pleading to the merits. Laithe v. McDonald, 7 Kan. 254 (1871); Bell v. Railroad Co., 71 U. S. 598 (1866). Consequently, the weight of authority is that it cannot first be taken advantage of at the trial by objecting to the admission of evidence. American Bond & Investment Co. v. Hopkins, 104 Pac. Rep. 1040 (Colo. 1909); Robinson v. Metropolitan Life Insurance Co., 80 S. W. Rep. 9 (Mo. 1904). So, objection to the introduction of evidence on the ground that the petition does not state a cause of action is equivalent to a demurrer to the petition and cannot be used to raise the objection of the uncertainty of the petition. Wey v. City Bank, 116 Pac. Rep. 143 (Okl. 1911). It is only where the petition, by omission of an essential averment, wholly fails to state any cause of action that such objection to the introduction of any evidence may be made. Jones v. Philadelphia Insurance Co., 78 Mo. App. 296 (1899); Consolidated Canal Co. v. Peters, 5 Ariz. 80 (1896). Similarly, it is not error to rule out evidence tending to support a plea bad in substance. Oxford Knitting Mills v. American Wringer Co., 65 S. E. Rep. 791 (Ga. 1909). However, where the sufficiency of a complaint is challenged by an objection to the admission of evidence, all intendments must be invoked in support of its allegations. Brooks v. Northern Pacific Ry. Co., 114 Pac. Rep. 949 (Or. 1911).

PROPERTY—GIFTS INTER VIVOS—CHOSES IN ACTION—A valid gift of a mortgage and note may be made *inter vivos* without writing. Hoyt v. Gillen, 148 N. W. Rep. 163 (Mich. 1914).

All that is necessary to constitute a valid transfer of property *inter vivos* by parol is an expression to that effect by the donor accompanied by a delivery of the thing to the donee. Choses in action are no exception to the general rule. So in the case under discussion no written assignment of the mortgage nor indorsement of the note in writing were necessary. Hoyt v. Gillen, *supra*. So, a promissory note, Grover v. Grover, 24 Pick. 661 (Mass. 1832), may be made the subject of a valid parol gift without writing. Likewise a savings bank deposit book, Watson v. Watson, 69 Vt. 243 (1896); a policy of life insurance assignable to legal representatives, Travelers Insurance Co. v. Grant, 54 N. J. Eq. 268 (1896); a certificate of deposit, 143 Ill. App. 450 (1908); certificates of stock, Brown v. Crofts, 98 Me. 40 (1903), Com. v. Crompton, 173 Pa. 138 (1890); a bond and mortgage, Hackney v. Vrooman, 62 Barb. 650 N. Y. (1862).

Where a claim of a gift *inter vivos* is not asserted until after the death of the donor, there must be clear and convincing proof that the subject of the gift had passed by a valid and effective gift. Jones v. Falls, 101 Mo. App. 536 (1903); Thomas v. Tilby, 147 Ala. 189 (1906); *In re* Schroeder,

186 N. Y. 537 (1906). Where the evidence points to the creation of a trust, the gift cannot be sustained, 89 App. Div. 400 (N. Y. 1903). But where the donor and the donee reside in the same house as in the case of husband and wife, or parent and child, it is not required that the thing given should be removed from the common residence. Shepard v. Shepard, 164 Mich. 183 (1910). Nor is the gift annulled if the donee delivers it back into the possession of the donor as where the donee of a promissory note handed it back to the donor with the request that he keep it for him or collect it for him. Grover v. Grover, *supra*. Where a gift of stock has been fully executed so as to transfer the legal title to the donee, the fact that the donor retains the certificate in his possession is immaterial. Robert's Appeal, 85 Pa. 84 (1877).

SPECIFIC PERFORMANCE—REFUSAL OF WIFE TO JOIN IN DEED—A purchaser is not entitled to specific performance of a valid contract for the conveyance of land from a husband whose wife refuses to join in the conveyance, with either an abatement of the price *pro tanto* for the outstanding inchoate right of dower, or to a decree requiring the seller to give indemnity against a future claim of such a right. Long v. Chandler, 92 Atl. Rep. 256 (Del. 1914).

It is a general rule that if a vendor is unable to convey a good and unincumbered title, according to his agreement, the vendee has a right to specific performance with an abatement of the purchase price. Mortlock v. Buller, 10 Ves. Jr. 292 (Eng. 1804); Townsend v. Vanderworker, 160 U. S. 171 (1895); Lancaster v. Roberts, 144 Ill. 213 (1893); Keator v. Brown, 57 N. J. E. 600 (1899); Napier v. Darlington, 70 Pa. 64 (1872). There is a conflict of authority as to whether this rule applies to cases such as the one under consideration. A decree for specific performance by the husband was ordered with an abatement of fine in Woodbury v. Luddy, 96 Mass. 1 (1867); Noecker v. Wallingford, 133 Iowa, 605 (1907); Wright v. Young, 6 Wis. 127 (1856); and also in Minnesota, Indiana, Michigan and Alabama. The objection to such a decree is the impossibility to determine accurately the amount of the abatement, because of the double contingency of the wife surviving the husband. North Carolina deems the tables of mortality sufficient evidence of the value of inchoate dower, Bethell v. McKinney, 164 N. C. 71 (1913), but Illinois, New York, New Jersey, Oregon, Ohio, Virginia, Pennsylvania, Missouri and the District of Columbia refuse to give such a decree. Bateman v. Riley, 72 N. J. Eq. 316 (1907); Riesz's Appeal, 73 Pa. 485 (1873); Cowan v. Kane, 211 Ill. 575 (1904). If there is fraud or collusion on part of the husband in the refusal of the wife specific performance will be decreed, Riesz's Ap., *supra*, Bateman v. Riley, *supra*. So also if the vendee is willing to pay full purchase price for the husband's interest. Brown v. Ward, 110 Iowa, 123 (1898); Harrigan v. McAleese, 16 Atl. R. 31 (Pa. 1888).

SURETYSHIP—JUDGMENT AGAINST PRINCIPAL—RES JUDICATA—A surety on an administrator's bond is, though not a party to the proceedings, bound and concluded by a judgment against his principal, in the absence of fraud or collusion; the judgment against the principal is *res adjudicata* and cannot be collaterally attacked in an action on the bond. Pierce v. Maetzald, 148 N. W. Rep. 302 (Minn. 1914).

The principal case is in accord with the majority view, Nevitt v. Woodburn, 160 Ill. 203 (1896), Allen v. Trust Co., 211 Mass. 409 (1912); that sureties on administrator's bond, being privy to the proceedings against their principal, Kenck v. Carchen, 22 Mont. 519 (1899); are in the absence of fraud, Gerould v. Wilson, 81 N. Y. 573 (1885); concluded by a decree of a probate court as to principal's liability, Barney v. Babcock, 115 Wis. 409 (1902); even though not actual parties to the accounting of principal, Yang's Est., 199 Pa. 35 (1901). Judgments against the administrators cannot be collaterally attacked by the surety in an action on the bond, Bonnor v. Gorman, 77 S. W. Rep. 602 (Ark. 1903); the only defences being payment, Comm. v. Ruhl, 199 Pa. 40 (1901); removal of administrator before judgment was obtained,

Bourne v. Todd, 63 Me. 427 (1874); Statute of Limitations, Dawes v. Shed, 15 Mass. 6 (1818); want of jurisdiction, Browning v. Vanderhorn, 4 Abb. 166 (N. C. 1886); and inability of the estate to pay the debt, Griffin v. Justices, 22 Ga. 590 (1857). This doctrine does not apply where the surety has been discharged by a secret agreement between the administrator and the distributees of the estate, whereby the administrator may use the moneys of the estate for his personal affairs. Brooks v. People, 15 Ill. App. 570 (1884).

In some jurisdictions a surety is not bound by a decree of the court on final settlement of the account of administrators. Street v. Henry, 27 So. Rep. 411 (Ala. 1900); Creutz v. Artsman, 8 Ky. L. Rep. 422 (1887); Canal Co. v. Brown, 4 La. Ann. 546 (1849). The rule in some jurisdictions is that a judgment against an administrator is *prima facie* evidence against his sureties, Bennett v. Graham, 71 Ga. 211 (1883), who can impeach it only by proof of collusion or mistake, O'Connor v. State, 18 Ohio St. 225 (1868).

TORTS—LIABILITY FOR RUNAWAY TEAM—The owner of a team of horses which runs away on the private premises of the owner is liable for injuries caused by it to person on the highway only on proof of negligence. Briggs v. Lake Auburn Crystal Ice Co., 92 Atl. Rep. 185 (Me. 1914).

At the common law an owner's liability for the escape of domestic animals from his premises was absolute and it was not necessary to prove negligence. Rust v. Low, 6 Mass. 90 (1809); Wells v. Howell, 19 Johns, 385 (N. Y. 1822); Barber v. Mensch, 157 Pa. 390 (1893). The absurdity of this view was pointed out by Cornish, J., in the course of his opinion in the principal case: "It would make the milkman an insurer when he loads his team in his own dooryard, but liable simply for negligence when his team runs away while on the public street or in any other dooryard on his route." Even in the case of other domestic animals the common law rule of absolute liability has been considerably modified. In certain of the western states it has been held inapplicable as not suited to local conditions. Merritt v. Hill, 104 Cal. 184 (1894); and in other states has been changed by statute or held inconsistent with local legislation. Otis v. Morgan, 61 Ia. 712 (1883). In Fallon v. O'Brien, 12 R. I. 518 (1880), the rule was rejected as illogical. By a rule based on practical necessity, there is no liability unless there be negligence for the trespasses of cattle being driven along highways. Tillett v. Ward, 10 Q. B. D. 17 (Eng. 1882).

TORTS—RULE IN *Rylands v. Fletcher*—EXPLOSIVES—A railroad car containing dynamite was being unloaded on one of the railroad's piers in Jersey City when it exploded and wrecked the libellant's vessel. There was no evidence of negligence. *Held:* The railroad company is not liable. Actiesselskabet Ingrid v. Central Railroad of New Jersey, 216 Fed. Rep. 72 (1914).

In this case the doctrine of Rylands v. Fletcher, L. R. 3 N. L. 330 (Eng. 1868), which has been accepted in Massachusetts, Wilson v. City of New Bedford, 108 Mass. 261 (1871), Shipley v. Fifty Associates, 106 Mass. 194 (1870); Ohio, Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560 (1899); Minnesota, Cahill v. Eastman, 18 Minn. 324 (1872); Berger v. Minneapolis Gas Light Co., 60 Minn. 296 (1895); and the District of Columbia, Brennan Construction Co. v. Cumberland, 29 App. D. C. 554 (1907), was pressed on the court which, in an exhaustive resumé of the decisions in the United States, criticized the principal of absolute liability laid down by the House of Lords when applied to the conditions existing in this country. It was pointed out that the majority of jurisdictions in this country have repudiated the English doctrine. Losee v. Buchanan, 51 N. Y. 476 (1873); Brown v. Collins, 53 N. H. 472 (1873); Marshall v. Wellwood, 38 N. J. Law 339 (1876); Jennings v. Davis, 187 Fed. 703 (1911).

However, regardless of the question as to whether the doctrine of Rylands v. Fletcher, *supra*, should be applied here, the facts of the principal case come within two of the well recognized exceptions to the rule. As the court pointed out, a common carrier is never liable in such a case as this without

proof of negligence. Mr. Justice Blackburn clearly stated this in his opinion in Rylands v. Fletcher, *supra*, when he said: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of inevitable danger; . . . Therefore, they cannot recover without proof of want of care or skill occasioning the accident." Moreover it is submitted that the principal case comes within the exception of The Eastern and South African Telegraph Co. v. Cape Town Tramways Co. (1902), A. C. 481, which held that there was no liability when the doing of the act which caused the injury was authorized by statute. In this case the transportation of dynamite was not an infringement of the powers conferred on the railroad by its charter.

TORTS—RULE IN *Rylands v. Fletcher*—WATER MAINS—The cables of an electric lighting company, placed underground by legislative authority, were damaged by the bursting of high-pressure water mains, operated by an hydraulic power company under similar statutory sanction. *Held:* Even though it had not been guilty of any negligence, the hydraulic power company was liable for the damage done to the property of the electric company. Charing Cross Electricity Supply Co. v. London Hydraulic Power Co., 111 L. T. R. 198 (Eng. 1914).

By the rule of Rylands v. Fletcher, L. R. 3 H. L. 330 (Eng. 1868), a person who, for his own purpose, brings on his land, and keeps there, anything likely to do mischief if it escapes, must keep it there at his peril, and he is answerable, even if he be not negligent, for all the damage which is the natural consequence of its escape. Ballard v. Tomlinson, 29 Ch. D. 115 (Eng. 1885). Though the authority of Rylands v. Fletcher is unquestioned in England, there has been an apparent tendency to limit its application, Ponting v. Noakes, 22 B. 281 (Eng. 1894), and juries have been practically empowered to mitigate the rule, whenever its operation seems too severe. Nichols v. Marsland, L. R. 2 Ex. Div. 1 (Eng. 1876). It has been held that the escape of dangerous things brought upon one's land under legislative authority does not render one liable, unless the damage was due to negligence. Vaughan v. Taff Vale Rwy. Co., 5 H. & N. 679 (Eng. 1860); National Telephone Co. v. Baker, 2 Ch. 186 (1893). The court in the principal case, however, extends the doctrine of Rylands v. Fletcher to the case of co-users of public property under statutory sanction, following Midwood v. Manchester Corporation, 2 K. B. 597 (Eng. 1905).

In American jurisdictions the rule of Rylands v. Fletcher has been the subject of considerable discussion. In some states it has been adopted and favored, Shipley v. Fifty Associates, 106 Mass. 194 (1870); Baltimore Breweries Co. v. Ranstead, 28 Atl. Rep. 273 (Md. 1894); but in others it is denied and repudiated. Losee v. Buchanan, 51 N. Y. 476 (1873); Sanderson v. Penna. Coal Co., 113 Pa. 126 (1886); Cumberland Telephone Co. v. United Electric Co., 42 Fed. Rep. 273 (1890). For a full discussion of this subject, see Pollock's Torts (ed. 1912), pp. 497-507; "The Rule in Rylands v. Fletcher," 59 U. OF P. L. R. 289.

TRUSTS—CREATION—PRECATORY WORDS—The residue of an estate was bequeathed to a nephew with the words, "It is my desire that he shall distribute the same among my nephews and nieces." *Held:* As the subject-matter and the objects are sufficiently certain, the precatory words in the will created a trust. *In re* Dewey's Estate, 143 Pac. Rep. 124 (Utah, 1914).

The court in the principal case follows the old doctrine that a trust will be raised on precatory words, notwithstanding the fact that there was an absolute gift, where the objects and subject of the supposed trust are definite and certain. Eeles v. England, 2 Vern. 466 (Eng. 1704); Malim v. Keighley, 2 Ves. Jr. 333 (Eng. 1794). The reason for regarding desiderative or hortatory expressions as manifestly implying an intention to create a trust

was said to be that "the wish of a testator, like the request of a sovereign, is equivalent to a command". Hill's Trustees (ed. 1867), 73. Though this view is occasionally adopted in more recent decisions, Murphy v. Carlin, 113 Mo. 112 (1892); Knox v. Knox, 59 Wis. 172 (1884), the modern tendency in England, as well as in the American jurisdictions, is to give less force than formerly to such expressions. Stead v. Mellor, 5 Ch. D. 225 (Eng. 1877); *In re* Oldfield, 1 Ch. 549 (Eng. 1904); Lumpkin v. Rodgers, 155 Ind. 285 (1900). The Pennsylvania courts early repudiated the old rule, Pennock's Estate, 20 Pa. 268 (1853), where the court said: "Words in a will expressive of desire, recommendation, and confidence are not words of technical, but of common parlance, and are not, *prima facie,* sufficient to convert a devise or a bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania." *Accord: In re* Bellas, 176 Pa. 172 (1896). The trend of modern authority is to regard precatory words as insufficient to create a trust unless it is clearly shown that the testator actually intended them to be mandatory, using the terms as polite forms of command rather than request. *In re* Conolly, 1 Ch. 219 (Eng. 1910); Fellows v. Durfey, 79 S. E. Rep. 621 (N. C. 1913).

For a full treatment of this subject see Jarman's Wills, vol. I, §868 (ed. 1910), and Perry's Trusts and Trustees, vol. I, §112 (ed. 1911).

TRUSTS—ENFORCEMENT—LAPSE OF TIME—Where one has been permitted without question for nearly twenty years to hold the absolute title to property as his own, a bill in equity alleging merely that the property was held "in trust" and asking for a decree to enforce the trust, without stating any facts to excuse the long delay, will be dismissed. Alexander v. Fidelity Trust Co., 215 Fed. Rep. 791 (1914).

In this case the plaintiff failed to specify whether the trust was express or not. As a general rule, lapse of time in itself will not bar the *cestui que trust* of an express or continuing trust of his rights as against the trustee. Whetsler v. Sprague, 224 Ill. 461 (1906); Anderson v. Fry, 102 N. Y. Supp. 112 (1907). But even in such cases a court of equity may refuse to enforce a trust on the ground of laches where the beneficiary, with actual or constructive knowledge of a breach of trust or an assertion of adverse title, has inexcusably and unreasonably delayed asserting his rights. Maggini v. Jones, 223 Pa. 301 (1909); Sawyer v. Cook, 188 Mass. 163 (1905). However, although laches may be set up against an express trust, courts of equity apply the rule in such cases much less readily than in cases of constructive or resulting trusts. In the latter case, equity will refuse its aid to stale demands, where a party has slept upon his rights, or has acquiesced for a great length of time. Hughes v. Letcher, 168 Ala. 314 (1910); Newman v. Newman, 60 W. Va. 371 (1906). Mere delay, however, will not constitute laches, where there is a good excuse for the delay. Laughlin v. Laughlin, 219 Pa. 629 (1907). But as shown in the principal case, the excuse must be definitely set forth in the bill. Martin v. Martin, 74 Atl. Rep. 864 (Del. 1900). No general rule can be laid down as to what time constitutes sufficient delay to bar the beneficiary on the ground of laches. The tendency, however, is to act on the analogy of the Statute of Limitations, and to use that as a guide. Dunn v. Dunn, 137 N. C. 533 (1905); Merton v. O'Brien, 117 Wis. 437 (1903). In some jurisdictions, as in Pennsylvania, a special period of limitation within which an implied or resulting trust must be enforced is expressly prescribed by statute. Cooper v. Cooper, 61 Miss. 676 (1884); Braun v. Church, 198 Pa. 152 (1901).

TRUSTS—TENTATIVE TRUSTS—DEPOSIT IN BANK—The deceased deposited a sum of money in a bank "payable to self or George T. Pierce or Caroline Dinsdale, an equal amount to each". Statements made by the deceased at time of making the deposit and at other times showed that she intended to use the interest of this money herself and leave the principal for George and Caroline. *Held:* Such constituted the bank a trustee of the funds in

favor of George and Caroline, who may enforce this trust. Boyle v. Dinsdale, 143 Pac. Rep. 136 (Utah, 1914).

This case follows the general rule that where money is deposited in a bank in the name of another the beneficiary may claim the deposit after the creator's death. Smith v. Savings Bank, 64 N. H. 228 (1886); *In re* Totten, 179 N. Y. 112 (1904). By this deposit, a tentative trust is created, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book to the beneficiary, Stockert v. Savings Bank, 139 N. Y. Supp. 986 (1913); and see 61 U. OF PA. L. R. 527 (1913). It is not necessary that the beneficiary even know of the deposit until after the depositor's death, for a valid trust can be created without the knowledge of the *cestui qui trust.* Merigan v. McGonigle, 205 Pa. 321 (1903); Marshall v. Marshall, 160 S. W. Rep. 775 (Ky. 1913); 62 U. OF P. L. R. 581 (1914).

A voluntary trust can be enforced by the beneficiary so long as it has been executed and not revoked. Hammerstein v. Equitable Trust Co., 103 N. E. Rep. 706 (N. Y. 1913); 62 U. OF P. L. R. 483 (1914).

WORKMEN'S COMPENSATION—INJURY OCCURRING "IN THE COURSE OF" AND ARISING "OUT OF" THE EMPLOYMENT—A section hand in the employ of a railroad left his tool house and while walking along the tracks on his way home to the noonday meal was struck by a train and killed. *Held:* There can be no recovery under the Workmen's Compensation Act as injuries did not arise "out of" and "in the course of" the employment. Hills v. Blair, 148 N. W. Rep. 243 (Mich. 1914).

An injury is received in the course of employment when it comes while the workman is doing the duty which he is employed to perform. *In re* Employer's Liability Corp., 102 N. E. Rep. 697 (Mass. 1913), it arises "out of" the employment when it results from a risk incidental to the employment, as distinguished from a risk common to all mankind. Pierce v. Provident Co. [1911], 1 K. B. 997 (Eng. 1911); Bryant v. Fissell, 86 Atl. Rep. 458 (N. J. 1913). A workman is in the course of his employment not only while doing his actual service, but also while eating or resting on the master's premises, Marshall v. S. S. Wild Rose [1909], 2 K. B. 46 (Eng. 1909), even though the employment is for a limited number of hours, Blovelt v. Sawyer [1904], 1 K. B. 271 (Eng. 1904); Clem v. Motor Co., 144 N. W. Rep. 848 (Mich. 1914). But if the servant during the working hours, even with the master's permission, leaves the latter's premises for purpose of satisfying the wants of nature, he is not in the course of the employment, Gilbert v. S. S. Nizan [1910], 2 K. B. 555 (Eng. 1910); McKrill v. Howard & Jones, 2 B. W. C. C. (Eng. 1909). An employee is in the course of his employment, if to relieve a call of nature, he goes to a part of the master's premises other than that which is the scene of his duties, Jabriskil v. Ry. Co., 88 Atl. Rep. 824 (N. J. 1913). See also 62 U. OF P. L. R. 428.

In re Sundine, 105 N. E. Rep. 433 (Mass. 1914), where an employee was injured, after leaving the room in which she was employed to get her lunch, upon a flight of stairs which were not under the control of the employer, the court held that the injury arose "out of" and "in the course of" the employment. At first glance that case appears not to be in accord with the principal case nor with the English decisions; but it may be distinguished from those cases in so far as, in the Sundine case the stairs on which the servant was injured afforded the only means of going to and from the workroom and therefore the using of them was an incident to the employment; while in the other cases the injured workman had several ways of going to and from his work.